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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1286

[redacted]

UNITED STATES OF AMERICA,

[redacted]

vs.

WALTER H. RICHTER,

[redacted] *Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1974

JOSEPH L. BERNARDI,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee, Third Party Plaintiff,

vs.

WALTER H. RICHTER,

Third Party Defendant-Appellant, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now Comes Walter H. Richter, Petitioner, and states:

1.

Reference is hereby made to the Order and Per Curiam opinion of the United States Court of Appeals for the Seventh Circuit decided December 23, 1974, rehearing denied January 14, 1975, heard before Swygert, Chief Judge, Maris, Senior Circuit Judge (sitting by designation), and Cummings, Circuit Judge. For copy of opinion, see Appendix.

2.

The rehearing was denied on January 16, 1975, by the Court of Appeals, and judgment against Petitioner entered in the amount of $65,689.86 with interest was affirmed. The Per Curiam opinion of the Court of Appeals is given in the Appendix to this Petition. The motion for a rehearing was denied by the Court of Appeals on January 16, 1975.

3.

The jurisdiction of this Court is invoked under U.S. Code Title 28, Section 1254(1).

4.

The question presented for review is whether Richter was the person responsible for the payment of withheld taxes and whether he willfully failed to pay them over to the United States so that he became liable for penalties under Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C., Section 6672) and whether the adoption and conclusions of law in favor of the government in 74-1 U.S. Tax Case R 91 70 (N.D. Ill. 1973) and findings of fact therein were properly adopted by the Circuit Court of Appeals.

The undisputed facts show that the company of which Richter was president and a director had from its inception of more than a year prior to the dates involved signed its payroll checks by machine under the direction of an officer (not Petitioner) and the funds otherwise available for deposit with the United States government were sequestered without notice to Petitioner, and without his knowledge, by the Central National Bank of Chicago, when the finance company that up to said time had purchased the

accounts receivable from the debtor company, without notice, ceased buying or advancing money upon the receivables. The undisputed facts show that neither the Petitioner nor any of the other officers and directors had any warning thereof, or had any reason to believe that such action would be taken. Petitioner's company was given the funds to meet the payroll due the latter part of April, 1966, but was not given any funds to deposit the withholding tax involved.

5.

The further question whether the assessment by the Commissioner of the penalty upon Petitioner, in the form of an excise tax, violated the Fifth Amendment to the United States Constitution by requiring Petitioner to make payment of an excise tax without access to the United States Tax Court and without jurisdiction in any court to hear his complaint, whether such action by the Commissioner of Internal Revenue deprived the Petitioner of the equal protection of the laws.

6.

There is absolutely no evidence in the record and we believe this will be admitted, that the Petitioner, Richter, or any of the other officers had any reason to believe that any of the funds of Petitioner's company would be sequestered and taken by the Central National Bank of Chicago and that the finance company would refuse to continue to purchase and make advancements on the company's accounts receivable. It is the contention of Petitioner, who is made a third-party defendant in the suit to which he originally was not a party, that the lower court and Court of Appeals of the Seventh Circuit changed the language of the Act of Congress from "willfully and intentionally fail-

ing to deposit the withholding tax" to "a liability upon the controlling officers for failing to take action of any kind which could prevent the deposit of withholding tax to be made". (Quote is suggested upon Petitioner's part.)

7.

The basis for review of the Federal Court judgment and the basis for the jurisdiction of the District Court originally was through the device of Joseph L. Bernardi bringing an action against the United States of America and of the United States of America impleading Walter H. Richter, the Petitioner, as a third-party defendant (after the commissioner made the penalty assessment against petitioner). (Parenthesis ours)

8.

We believe that an important question of Federal law which, as far as we know, has not been settled by this Court under the peculiar facts of the case at bar, constitutes a violent abuse of statutory construction by both the District Court and the Circuit Court of Appeals, and constitute legislation upon the part of these Courts and not construction of an Act of Congress. It is further contended that under the circumstances of the case at bar Walter H. Richter, Petitioner, has been deprived of the equal protection of the laws in violation of the 5th Amendment to the United States Constitution.

We believe that the question is of great public importance in that if the decision of the Court of Appeals is permitted to stand, many taxpayers who have no reason to believe that their funds will be sequestered and taken from them, but who failed to make a segregation of the funds, can be

held to have willfully and intentionally caused the withholding taxes of their employees not to be paid, under circumstances beyond their control.

We believe that there is a vital distinction between the provision of the Act of Congress which at the time required the deposit of the taxes to be made at the end of April of the year involved, the end of the quarter, and the decision of the lower Courts that required such deposits to be made in any event, forthwith.

The Act of Congress in force at the time definitely and intentionally was designed to avoid arguments as to whether the failure to make the deposit and the failure to segregate the funds would be involved in each case. The Congress wanted to avoid all arguments as to what degree trustees who were employers had to exercise preventive care concerning the deposit of withholding taxes.

We do not claim that if, at the time of the payment of the wages, the Petitioner had any reason to believe that the company would not have enough funds to pay the withholding tax there would not be a liability. But, in the case at bar there were no facts existing which would give reason to believe upon the part of the Petitioner that the withholding funds would not be available at the end of April, the required time for the deposit.

Most of the cases cited by the Court below and by the United States are cases in which the controlling officers had reason to believe that due to the shaky financial condition of the company the funds would not be available for deposit, covering the withholding tax.

To apply a harsh rule, that a nonintentional, nonwillful failure to deposit withholding tax becomes willful and in-

tentional upon the happening of an event that could not be anticipated and could not be prevented by the officer or the company, clearly constitutes legislation upon the part of the Courts and does violence to the meaning of the Act of Congress and its clear language.

If such construction be adopted, it sanctions without access to a Court the ability of the Commissioner to seize property, without giving the Petitioner access to the Tax Court or to any Court. Such construction clearly deprives the Petitioner of the equal protection of the laws and its property without due process of law, under the 5th Amendment to the United States Constitution.

We believe the constitutional question to be so clear as applied to the admitted facts of this case that we do not need to belabor the point by citing cases.

If the Court agrees that the construction of the Act of Congress is violently wrong, as applied to the case at bar, we believe that such construction obviously is unconstitutional.

We further point out that the excise tax involved is different than the small percentage tax on the sale of perfume and cosmetics. The amount involved running to thousands of dolars places a burden upon Petitioner intolerable under the Constitutional provisions above cited.

Respectfully submitted,

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Attorney for Petitioner
Walter H. Richter

APPENDIX TO PETITION

1. STATUTES INVOLVED:

(INTERNAL REVENUE CODE)

[Sec. 6671]

Sec. 6671. Rules for Application of Assessable Penalties.

(a) PENALTY ASSESSED AS TAX.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

Source: Secs. 1718(c) (part), 1821(a)(3) (part), 2557(b)(4) (part), 2707(a) (part), 1939 Code, substantially unchanged.

(b) PERSON DEFINED.—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Source: Secs. 1718(d), 1821(a)(4), 2557(b)(8), 2707(d), 1939 Code, substantially unchanged.

• • •

[Sec. 6672]

Sec. 6672. Failure to Collect and Pay Over Tax, or Attempt to Evade or Defeat Tax.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully

fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Source: Secs. 1718(c) (part), 1821(a)(3) (part), 2557(b)(4) (part), 2707(a) (part), 1939 Code.

• • •

[Sec. 7501]

Sec. 7501. Liability for Taxes Withheld or Collected.

[Sec. 7501(a)]

(a) GENERAL RULE.—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Source: Sec. 3661, 1939 Code, substantially unchanged.

[Sec. 7501(b)]

(b) PENALTIES.—

For penalties applicable to violations of this section, see sections 6672 and 7202.

2. OPINION OF THE COURT OF APPEALS:

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 74-1395 and 74-1396

JOSEPH L. BERNARDI,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee and Third-Party Plaintiff,

v.

WALTER H. RICHTER,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 70 C 3116
PHILIP W. TONE, *Judge.*

HEARD NOVEMBER 6, 1974 — DECIDED DECEMBER 23, 1974

Before SWYGERT, *Chief Judge,* MARIS, *Senior Circuit Judge,** and CUMMINGS, *Circuit Judge.*

PER CURIAM. The principal question presented by this appeal is whether the district court correctly found taxpayers Bernardi and Richter were persons responsible

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* Senior Circuit Judge Albert B. Maris of the Third Circuit is sitting by designation.

for payment of withheld taxes and that they willfully failed to pay them over to the United States, so that they were liable for penalties under Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C. § 6672). The district judge entered findings of fact and conclusions of law in favor of the Government. 74-1 U.S. Tax Cas. ¶ 9170 (N.D. Ill. 1973). We adopt those findings of fact and conclusions of law as our opinion herein.[1]

JUDGMENT AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] See also *Harrington* v. *United States*, ... F. 2d ..... (1st Cir. 1974), 9 CCH 1974 Stand. Fed. Tax Rep. (74-2 U.S. Tax Cas.) ¶ 9772.

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3. CASES CITED IN SUPPORT OF PETITION:

In re Halo Metal Products, 419 F. 2d 1068

Randall v. *U. S.*, 400 U.S. 513 (1971)

Browne v. *U. S.*, 234 F. Supp. 19 (D.C. Minn. 1964)

Dathof v. *U. S.*, 370 F. 2d 655, 67-1 U.S.T.C. No. 9167 (3rd Cir. 1967)

Monday v. *U. S.*, 421 F. 2d 1210, 70-1 U.S.T.C., 9205 (7th Cir. 1970)

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4. ORDER DENYING PETITION FOR REHEARING:

In the

United States Court of Appeals

For the Seventh Circuit

January 16, 1975.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ALBERT B. MARIS *Sr. Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

JOSEPH L. BERNARDI,
Plaintiff-Appellant,

No. 74-1395 vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

WALTER H. RICHTER,
Third Party Defendant-Appellant,

No. 74-1396 vs.

UNITED STATES OF AMERICA,
Defendant Third Party Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(70 C 31 16)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1286

WALTER H. RICHTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STRATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the decision below that he was a person required to pay over to the Internal Revenue Service taxes which had been withheld from the wages of employees of certain corporations and that he had willfully failed to pay over the taxes. As a result, he was held personally liable for the unpaid taxes, pursuant to Section 6672 of the Internal Revenue Code of 1954.

The pertinent facts are as follows: During March and April, 1966, petitioner was the majority shareholder, chairman of the board of directors and chief executive officer of Continental-Harrison Company, Inc., and Continental-McClurg Company, Inc. (R. 43).[1] These corporations were indebted to the Central National Bank of Chicago for a substantial loan, and to the Commercial

[1] "R." references are to the record appendix filed in the court of appeals.

Discount Corporation of Chicago for advances secured by inventory and accounts receivable. Both of petitioner's corporations kept their general accounts with the Central National Bank.

Each corporation maintained a payroll account which was funded with checks drawn on the general accounts. Payments to the payroll accounts were made "net", after deduction of the withholding taxes due on the wages paid to the employees. However, although the corporations paid their employees "net" wages after subtraction of withholding taxes, neither corporation separately accounted for or segregated the withheld funds which were required to be paid over to the Internal Revenue Service (R. 43-44).

For some time, both corporations had encountered financial difficulties. While petitioner had been notified by the corporations' accountants that the corporations would have an estimated cash deficit of $854,000 at the end of March, 1966, petitioner arranged for payments to be made to the corporations' creditors during March and April, 1966, while the employment taxes remained unpaid. In late April, 1966, the banks exercised their security rights under their loan agreements with the corporations. The first quarterly employment tax returns for each corporation were not accompanied by remittance of the balances shown to be due, and one corporation's withheld taxes for the first month (April) of the second quarter were also not paid over to the government. The government asserted these tax claims in the ensuing bankruptcies of the corporations but there were insufficient assets available to permit any recovery (R. 44-45).

In Sepember 1969, the Internal Revenue Service assessed the taxes against petitioner, pursuant to Section 6672 of the Code, because petitioner was a person required to collect and pay over withholding taxes and had willfully failed to do so for the employees of the corporations for March and April, 1966 (R. 45). Another officer of the corporations paid part of an identical assessment and then instituted this refund suit. The government then counterclaimed for the balance of the assessment and filed a third-party complaint against petitioner. After a trial, the district court entered judgment against petitioner for the unpaid employment taxes (R. 47-48) and the court of appeals affirmed *per curiam* (Pet. App. 3a-4a).

1. The record supports the finding by both courts below that petitioner was required to pay over the withholding taxes and willfully failed to do so by preferring other creditors of his corporations. There is no basis for review by this Court of this factual question. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

Petitoner contends (Pet. 2-6) that he could not be personally liable for the withholding taxes for periods prior to April 30, 1966, because the taxes were not due to be paid until that date, and that the creditors had prevented the payment of the taxes by taking over the corporations' assets prior to April 30, 1966. But the duty of the person responsible for the withholding and payment of employment taxes is a continuing one "which arises when the federal income and social security taxes are withheld from employees' wages and ends when such funds are paid over to the United States." *Newsome* v. *United States*, 431 F.2d 742, 746 (C.A. 5); *United States* v. *Hill*, 368 F.2d 617, 621 (C.A. 5). Thus, petitioner cannot justify his failure to pay the taxes by his belief

that sufficient funds would be available on the due date for payment. It is his act of placing the tax funds at the risk of the business and claims of other creditors which constituted the breach of duty and rendered petitioner personally liable under Section 6672.

2. Petitioner further argues (Pet. 2-6) that the assumption of control over the funds of the corporations by the creditor banks precludes a finding of willfulness. However, prior to April, 1966, neither bank influenced the policies of the corporations or directed the manner or priority of paying the corporations' other creditors (R. 44). It was at this earlier time, before April 30, 1966, when the taxes were due to be paid, that petitioner should have segregated the withheld taxes from the corporations' general funds to insure their ultimate payment.

Finally, petitioner contends (Pet. 3-6) that his inability to challenge the assessment in the Tax Court denied him his right to due process under the Fifth Amendment. There is, however, no constitutional requirement that all federal tax disputes be presented to the Tax Court. That court has no jurisdiction over employment taxes so that the assessment here was challenged in the district court in a refund suit after the payment of one quarter's taxes for one employee. *Steele* v. *United States*, 280 F.2d 89 (C.A. 8). Such a procedure satisfies the constitutional requirement that there be an adequate opportunity for post-assessment judicial review. See *Phillips* v. *Commissioner*, 283 U.S. 589, 595; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.